

# The Family Court of the State of Delaware



FELICE GLENNON KERR  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
500 N. KING STREET, SUITE 9400  
WILMINGTON, DELAWARE 19801-3732

May 22, 2020

Kara M. Swasey, Esquire  
Bayard, PA  
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Wilmington, DE 19801

## LETTER DECISION AND ORDER

Jennifer A. Hartnett, Esquire  
Hartnett & Hartnett LLC  
7301 Lancaster Pike  
Hockessin, DE 19707

Re: S. S. v. E. S.  
File No.: CN15-03650; Petition No.: 20-05170  
Petition Type: Rule to Show Cause

Dear Counsel:

The Court held an initial case management teleconference on May 13, 2020 regarding the above-referenced Petition Rule to Show Cause ("RTSC"). During the teleconference, the parties clarified that they agreed upon the amounts paid by Husband and the dates on which he made the payments. The dispute is basically whether a payment made in April, 2018 was to be counted toward the "true-up" or if it predated the time frames impacted by the "true-up" provisions of the February, 2019 Stipulation and Order and would therefore not be considered in the "true-up". This dispute essentially impacts one month of payments and the total in dispute is less than \$5,000.00. At the conclusion of the teleconference, the Court indicated that it would review the Stipulation in light of the statements and clarifications by counsel regarding the relief sought during the teleconference to determine if the petition could be resolved without a hearing. Petitioner believes the Stipulation is clear and unambiguous on its face and Respondent believes that additional information is needed to clarify the intent of the parties.

The Court notes that the Order, which Respondent is alleged to be violating, is a

Stipulation and Order prepared by counsel for the parties and signed by the Court. This Stipulation, while an Order of the Court and enforceable through its contempt powers, is treated as a contract for purposes of interpretation and revision.<sup>1</sup> As the parties drafted the agreement, the Court cannot substitute its own terms for those of the parties.<sup>2</sup> When the written contract contains clear and unambiguous language, the parol evidence rule prohibits the consideration of extrinsic evidence if the contract is a complete integration of the parties' agreement.<sup>3</sup> If the plain meaning of the Stipulation cannot be determined on the face of the Stipulation, the Court may hear testimony and other parol evidence to determine the intent of the parties.

The basic premise of the "true-up" provision of the Stipulation and Order is that the parties agreed to use the K-1 income for each year but since the K-1 generally gets issued after there has been four months of payments already made, the first four months of the year would be paid using the prior year's K-1. The first year impacted was 2018. The 2018 K-1 would not come out until approximately April, 2019. Therefore, the prior year (May through April) is adjusted up or down depending on whether there was an overpayment or an underpayment. This adjustment, referred to as a "true-up", would be added or subtracted in the May payment or first payment after the tax returns are filed. The Stipulation recites at paragraph 5:

"If the amount paid by Husband to Wife *during* the prior May through April, based on the prior year's schedule K-1, is lower than the amount due, based on the current year's schedule K-1, Husband shall add such difference to the first payment due to Wife in May, or in the month following the filing of the LLC's tax returns if filed after April 30."

There is a mirror provision regarding any overpayment *during* the period of the prior May through April, which would be subtracted from the May payment, or the first payment after the tax returns are filed.

The use of the word "during" in the Stipulation is not ambiguous. At the time this Stipulation was entered, Husband was aware that he had made the disputed payment in April and not in May, 2018. This payment was clearly not made "during" May, 2018 through April, 2019 and Husband was aware that it was not paid during the applicable period of time. Had the parties intended to include the "prepayment" done *prior to* May, 2018 they would have spelled this out in the Stipulation.

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<sup>1</sup> Rockwell v. Rockwell, 681 A.2d 1017, 2021 (Del. 1996)

<sup>2</sup> *Id.*

<sup>3</sup> C.L.L. v. C.C.L., 2005 WL 4025394, \*4 (Del. Fam. (2005))

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**IT IS SO ORDERED** this 22nd day of **MAY, 2020**.

Very truly yours,

Felice Glennon Kerr, Judge

FGK:vm

Date emailed:  
Date mailed: